

Positive Criminological Forecast as a Premise for Conditional Discontinuation of the Proceedings

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Abstract: *Conditional discontinuation of the proceedings is a probation measure enabling perpetrators of minor offenses to avoid conviction and punishment. Under the currently applicable provisions of the Polish law, conditional discontinuation of the proceedings is one of the three measures related to putting the perpetrator on trial. The use of the described probation measure is possible only in the case of cumulative fulfilment of the conditions specified in the Article 66 of the Polish Penal Code. One of them is the so-called positive criminological forecast, which consists of many elements related to the perpetrator, because only the characteristics of the perpetrator strictly defined in the corresponding provision may determine the prognosis. The general point is to drop the conviction and, at the same time, to punish the perpetrator of the crime. The measure in question is only optional and may only be ordered by a court judgement.*

Key Words: *Criminal Law; Positive Criminological Forecast; Probation; Conviction; Punishment; Penal Code; Poland.*

Introductory notes

Conditional discontinuation of the proceedings is a probation measure enabling perpetrators of minor offenses to avoid conviction and punishment. This institution was first introduced to the Polish legislation in the Penal Code of year 1969. The prototype of the adopted solution should be found in the systems applicable, *inter alia*, in the Great Britain or Norway, where there is the so-called conditional suspension (stay) of the criminal proceedings while putting the perpetrator to a test.¹ Under the currently

¹ See Article 66 by G. Łabuda in GIEZEK, J. red. *Kodeks karny: Część ogólna: Komentarz* [Penal Code: General Part: Commentary]. 1. wyd. Warszawa: Wolters Kluwer, 2021. 969 p. ISBN 978-83-8223-295-0; and JANKOWSKI, M., S. MOMOT and A. WAŻNY. *Warunkowe umorzenie postępowania* [Conditional Discontinuation of the Proceedings] [online]. 1. wyd. Warszawa: Instytut Wymiaru Sprawiedliwości, 2011, pp. 1-2 [cit. 2022-12-02]. Available at: https://iws.gov.pl/wp-content/uploads/2018/08/AR_Jankowski-Momot-Wa%C5%BCny-War-um-post-2011.pdf.

applicable provisions of the Polish law, conditional discontinuation of the proceedings is one of the three measures related to putting the perpetrator on trial.² The use of the described probation measure is possible only in the case of cumulative fulfilment of the conditions specified in the Article 66 of the Polish Penal Code. One of them is the so-called positive criminological forecast, which consists of many elements related to the perpetrator, because only the characteristics of the perpetrator strictly defined in the corresponding provision may determine the prognosis.³

1 Conditions for conditional discontinuation of the proceedings

The conditional discontinuation of the proceedings may take place, as already indicated above, in the case of cumulative fulfilment of the conditions specified in the Article 66 of the Penal Code. They can be divided into the three groups: related to the perpetrator's act, related to the perpetrator and those that are of a procedural nature. It is worth noting here that the doctrine of criminal law also takes into account other classifications of conditions for conditional discontinuation of the proceedings. An example here may be divisions into the following premises: material and formal, positive and negative, absolute and relative, obligatory and optional, material and formal and legal. The positive criminological forecast, which is the subject of this study, belongs to the group of premises related to the perpetrator.⁴

The conditional discontinuation of the proceedings, as pointed out by Andrzej Marek, is an original creation of the Polish legal thought, but some analogies can be found in it to various forms of broadly understood

² See Article 66 by G. Łabuda in GIEZEK, J. red. *Kodeks karny: Część ogólna: Komentarz* [Penal Code: General Part: Commentary]. 1. wyd. Warszawa: Wolters Kluwer, 2021. 969 p. ISBN 978-83-8223-295-0; JANKOWSKI, M., S. MOMOT and A. WAŻNY. *Warunkowe umorzenie postępowania* [Conditional Discontinuation of the Proceedings] [online]. 1. wyd. Warszawa: Instytut Wymiaru Sprawiedliwości, 2011, pp. 1-2 [cit. 2022-12-02]. Available at: https://iws.gov.pl/wp-content/uploads/2018/08/AR_Jankowski-Momot-Wa%C5%B7Cny-War-um-post-2011.pdf, as well as MAREK, A. *Warunkowe umorzenie postępowania karnego* [Conditional Discontinuation of the Criminal Proceedings]. 1. wyd. Warszawa: Wydawnictwo Prawnicze, 1973, p. 19 and following.

³ See Article 66 by G. Łabuda in GIEZEK, J. red. *Kodeks karny: Część ogólna: Komentarz* [Penal Code: General Part: Commentary]. 1. wyd. Warszawa: Wolters Kluwer, 2021. 969 p. ISBN 978-83-8223-295-0.

⁴ Quoted after BOJARSKI, M., J. GIEZEK and Z. SIENKIEWICZ. *Prawo karne materialne: Część ogólna i szczególna* [Material Criminal Law: General and Special Part]. 3. wyd. Warszawa: LexisNexis, 2007, pp. 319-320. ISBN 978-83-7334-817-2.

probation.⁵ This measure is applied by the court. It takes place for a probationary period of one to three years.⁶ There is a noticeable distinction in the doctrine as to whether the measure in question is a conviction but not a punishment or not a form of criminal liability and, therefore, not a conviction. Although the first of the above-mentioned views has many supporters, nowadays, as Rafał Kamiński notices, the latter is the majority of the representatives of the doctrine. Its supporters are of the opinion that although conditional remission is recognition of the fact that the accused person has committed the act, and his/her guilt, in this regard, is only an innovative form of legal and not criminal liability. The judiciary also takes the position that the measure which is the conditional discontinuation of the proceedings cannot be considered as a kind of a form of conviction. Moreover, the doctrine lacks agreement as to whether the said measure should be treated as *a release from criminal liability, a measure of criminal law reaction to a crime, a type of conditional sentencing, a criminal measure related to trial or a manifestation of opportunism in prosecuting crimes*. The quoted author also points out that the application of conditional discontinuation of the criminal proceedings is *a manifestation of breaking the presumption of innocence*, because its application and imposition of obligations on the convict take place despite the fact that he/she has not been proven guilty by a final conviction.⁷

In the opinion of Lech Gardocki, the essence of the discussed institution is to avoid not only imposing a punishment on the perpetrator, but also a conviction and a significant part of the criminal proceedings themselves, which is usually a considerable ailment for the perpetrator.⁸

The prerequisites for the conditional discontinuance of the proceedings have been included, as already mentioned above, in the Article 66 of the Penal Code, which reads as follows: “§ 1. *The court may conditionally*

⁵ See MAREK, A. *Prawo karne* [Criminal Law]. 10. wyd. Warszawa: C. H. Beck, 2011, p. 296. ISBN 978-83-255-2755-6.

⁶ See GARDOCKI, L. *Prawo karne* [Criminal Law]. 21. wyd. Warszawa: C. H. Beck, 2019, p. 191. ISBN 978-83-8158-722-8.

⁷ See KAMIŃSKI, R. Charakterystyka wybranych instytucji probacyjnych w kontekście udziału organizacji pozarządowych w ich realizacji [Characteristics of Selected Institutions of Probation in the Context of the Participation of Non-governmental Organizations in Their Implementation]. *Białostockie Studia Prawnicze* [online]. 2016, vol. 21, pp. 139-140 [cit. 2022-12-02]. ISSN 2719-9452. Available at: <https://doi.org/10.15290/bsp.2016.21.10>.

⁸ See GARDOCKI, L. *Prawo karne* [Criminal Law]. 21. wyd. Warszawa: C. H. Beck, 2019, p. 191. ISBN 978-83-8158-722-8.

discontinue the criminal proceedings if the guilt and social harmfulness of the act are not significant, the circumstances of its committing do not raise any doubts, and the attitude of the perpetrator not punished for an intentional crime, his/her properties and personal conditions and the current way of life justify the assumption that despite the discontinuance of the proceedings, he/she will observe the legal order and, in particular, he/she will not commit a crime. § 2. Conditional remission shall not apply to the perpetrator of an offense punishable by more than 5 years' imprisonment.”⁹

As for the premise set out in the second paragraph, the provision is so clear that it does not need any additional discussion. However, it is worth taking a look at the premises indicated in the first paragraph. In this context, this measure can be applied: if the perpetrator has not been punished for an intentional crime so far (without taking into account the seized convictions), there is no doubt as to the circumstances of the act, the guilt and social harmfulness of the act are not significant, and there is a positive forecast that the perpetrator will follow the legal order and will not commit a new crime after the conditional discontinuation of the proceedings is applied.¹⁰ *“The attitude of the perpetrator, his/her properties, personal conditions and the way of life so far”* make up the so-called positive criminological forecast which is a premise for the conditional discontinuation of the proceedings. The measure in question applies to offenders of low and medium importance. This is evidenced by the determination of the maximum upper risk limit for 5 years, as well as by the indication that the criminal act in a specific case may not be socially harmful to a significant degree. The positive criminological forecast, which is the subject of this study, is also extremely important as a premise for the conditional discontinuation of the proceedings. It should be remembered that while conditionally discontinuing the proceedings, it is also stated that the perpetrator is to blame, therefore, it is unacceptable to apply the said measure if there are doubts as to the guilt. This does not mean, however, that it is only used when the suspect pleads guilty. The lack of doubts as to the guilt may result from other evidence. We can also deal with a situation where the accused objects to the conditional discon-

⁹ See Article 66 of the *Act of 6 June 1997 – Penal Code* [1997]. *Journal of Laws of Poland*, 2021, item 2345.

¹⁰ See GARDOCKI, L. *Prawo karne* [Criminal Law]. 21. wyd. Warszawa: C. H. Beck, 2019, p. 191. ISBN 978-83-8158-722-8.

tinuation¹¹ of the proceedings (Article 341 § 2 of the Code of Criminal Procedure, which reads as follows: *“If the accused objects to the conditional discontinuance, as well as when the court finds that the conditional discontinuance would be unjustified, it refers the case to a hearing. The prosecutor’s motion for conditional discontinuation of the proceedings is replaced by the indictment. Within 7 days, the public prosecutor performs the activities specified in the Article 333 (additional elements of the indictment § 1 – 2)”*),¹² as a result of which the case is referred for trial.

The importance of the prerequisites for the conditional discontinuation of the proceedings is confirmed in its content by the judgement of the Supreme Court of Poland of 17 May 2016, III KK 28/16, KZS 2016, no. 9, item 9, with the following wording: *“The application of the institution of conditional discontinuation of the proceedings is possible only when there are strictly defined circumstances, most of which are of a substantive nature, which condition the recognition of the inappropriateness of continuing the criminal proceedings. Thus, the meriti court has the right (and not the obligation) to conditionally discontinue the proceedings if all the conditions provided for by the act are met, i.e. when: 1) the perpetrator’s guilt and the social harmfulness of the act are not assessed as significant; 2) there is no doubt as to the circumstances of the commission of the act; 3) the perpetrator has not been punished for an intentional crime so far; 4) the perpetrator’s attitude, personal characteristics and conditions, as well as the way of life to date justify the assumption that despite the discontinuance of the proceedings, he/she will observe the legal order and, in particular, he/she will not commit a crime (arg. ex-Article 66 § 1 of the Penal Code); 5) the offense is punishable by up to 5 years’ (from 1 July 2015) imprisonment (arg. ex-Article 66 § 2 of the Penal Code). [...] all the conditions for the conditional discontinuation of the proceedings absolutely must be fulfilled at the time of using this probation instrument. On the fulfilment of the conditions specified in the Article 66 § 1 of the Penal Code, the condition of no criminal record for an intentional crime is not determined by the limited knowledge of the court on the date of adjudication on the conditional discontinuation of the proceedings (resulting from: lack of current information about the conviction and its validity, e.g. from the National Criminal Register or other default of the court, or also the case, or even – of mis-*

¹¹ See GARDOCKI, L. *Prawo karne* [Criminal Law]. 21. wyd. Warszawa: C. H. Beck, 2019, pp. 191-192. ISBN 978-83-8158-722-8.

¹² See Article 341 § 2 of the Act of 6 June 1997 – Code of Criminal Procedure [1997]. Journal of Laws of Poland, 2021, item 534.

leading the procedural authority), only an objectively existing reality (found even after the ruling has been issued) characterizing the legal situation of the perpetrator.”¹³

Returning to the previously presented division of premises into those related to the act of the perpetrator, the person of the perpetrator and those that are of a procedural nature, it should be added that the first group includes the degree of guilt and social harmfulness of the act which are not significant and the fact that the alleged act is not at risk of a punishment exceeding 5 years' imprisonment. Regarding the first mentioned circumstance, it is worth noting that there are two positions in the doctrine of criminal law. The first – according to which the term “is not significant” is synonymous with the term “insignificant”, and the second – where the term “not significant” means a degree lower than “significant”, i.e., for example, an average or medium degree. On the part of the legislator, it was a deliberate operation intended to emphasize that it is only about a degree that “contradicts” a significant degree, thus one that is lower. Adopting the position that it is a “minor” degree would limit the applicability of this provision, which would be to the detriment of the perpetrator. As for the premises related to the perpetrator, they are the aforementioned positive criminological forecast and the perpetrator's clean criminal record for an intentional crime. They are closely related to each other. The first of them will be described in more detail in the next subsection, therefore, the essence of this criminal record will be indicated here. It is one of many, but a key prognostic element for assessing whether the perpetrator, despite the application of conditional discontinuation of the proceedings, will comply with the legal order and, in particular, whether he/she will not commit an offense again. The described condition will also be met when the perpetrator has already been punished for such an offense, but the conviction has been seized, and when the perpetrator was convicted of an intentional crime, but the penalty was waived or a self-imposed criminal measure was imposed. The legislator used in the wording of the Article 66 of the Penal Code the phrase “*not punished for an intentional crime*”, and not “*convicted of an intention-*

¹³ See *Judgement of the Supreme Court of the Republic of Poland Ref. No. III KK 28/16* [2016-05-17]. KZS 2016, no. 9, item 9, following KANIA-CHRAMĘGA, A. and O. WŁODKOWSKI. *Prawo karne materialne: Część ogólna: Kazusy i zadania problemowe: Orzecznictwo* [Material Criminal Law: General Part: Cases and Problem Tasks: Jurisprudence]. 2. wyd. Warszawa: Difin, 2020, pp. 262-263. ISBN 978-83-8085-591-5.

al crime". As for the procedural premise, it is "no doubts as to the circumstances of the offense."¹⁴

2 Positive criminological forecast

Brunon Hołyst points out that the problem of criminological forecasting is extremely complex, for instance due to the lack of a prognostic vocabulary commonly accepted in criminology. In view of the above-stated, it is not uncommon to use a certain kind of jargon, a mixture of concepts from many disciplines that criminology uses or borders on. The same author reminds that, until recently, the primary source from which many terms were borrowed was the American criminological literature. Generally speaking, forecasting should be understood as "a set of activities leading to obtaining information about the future course of phenomena."¹⁵ When it comes to the criminological forecasting, it is "every statement made about the future features of criminal phenomena, inferred from the earlier (obtained on the basis of observation) description of these phenomena and from the laws specifying the relationship of successive specific states determining these phenomena."¹⁶ Crime forecasting is divided into two basic categories, i.e. primary and recurrent crime forecasting. The first of these categories, as the naming suggests, concerns crimes committed for the first time. The second category, on the other hand, relates to other crimes committed by perpetrators who previously served their sentence. Each of the indicated categories has separate forecast ranges. Particular statements may refer to, for example, the future structure of crime, numerous causes of criminal phenomena, expected effectiveness of crime prevention tools or the size of the criminal population of adults and, similarly, minors. An independent form of criminological forecasting is forecasting individual criminal behaviour (formulated mainly in the area of recurring crime, i.e. recidivism).¹⁷

¹⁴ Quoted after BOJARSKI, M., J. GIEZEK and Z. SIENKIEWICZ. *Prawo karne materialne: Część ogólna i szczególna* [Material Criminal Law: General and Special Part]. 3. wyd. Warszawa: LexisNexis, 2007, pp. 319-320. ISBN 978-83-7334-817-2.

¹⁵ See HOŁYST, B. *Kryminologia* [Criminology]. 9. wyd. Warszawa: LexisNexis, 2007, p. 1298. ISBN 83-7334-559-0.

¹⁶ See HOŁYST, B. Podstawy i zakres indywidualnej prognozy kryminologicznej [Fundamentals and Scope of an Individual Criminological Forecast]. *Probacja* [online]. 2013, nr 1, p. 6 [cit. 2022-12-02]. ISSN 2719-311X. Available at: <https://www.arch.ms.gov.pl/pl/probacja/2013/download,2289,0.html>.

¹⁷ See HOŁYST, B. Podstawy i zakres indywidualnej prognozy kryminologicznej [Fundamentals and Scope of an Individual Criminological Forecast]. *Probacja* [online]. 2013, nr 1,

Katarzyna Witkowska-Rozpara notices that criminological forecasting has quite a long tradition and, from the very beginning, it was based on “*circumstances indicating the most likely variant of behaviour in the future. The very term “forecasting” is an attempt to outline – after taking into account the registered trends and certain laws – probable “variants of the future”, as well as the recognition of variables that determine the fulfilment of a given configuration.*”¹⁸

The prerequisite for adjudicating on any probation duties is the so-called positive criminological forecast. In the opinion of Włodzimierz Wróbel and Andrzej Zoll, it is “*the conviction that the perpetrator, despite applying a probation measure, will observe the legal order and, in particular, will not commit an offense again.*”¹⁹ Such a position is formulated by the court on the basis of an assessment of the attitude, the way of life (both before and after committing a prohibited act), but also the degree of socialization or, on the contrary, demoralization, family conditions, personality traits and attitude to social values. A certain determinant may also be intention or inadvertence of the alleged perpetrator of the act. The test time for the perpetrator is the test of the criminological forecast.²⁰ This is confirmed, *inter alia*, by excerpt from the judgement of the Supreme Court of Poland of 16 January 2015, V KK 377/14, KZS 2015, no. 5, item 17, which reads as follows: “*The institution of conditional discontinuance of the proceedings is included in the measures related to the submission of the perpetrator to a trial. This measure is adjudicated for a trial period, during which the accuracy of the criminological forecast, which is one of the premises of this type of judgement, is checked [...].*”²¹

pp. 6-7 [cit. 2022-12-02]. ISSN 2719-311X. Available at: <https://www.arch.ms.gov.pl/pl/probacja/2013/download,2289,0.html>.

¹⁸ Quoted after WITKOWSKA-ROZPARA, K. Pozytywna prognoza kryminologiczna jako materialna przesłanka warunkująca zastosowanie warunkowego zawieszenia wykonania kary. Uwagi na tle pojęcia „prognoza” oraz orzecznictwa sądów polskich [Positive Criminological Prognosis as the Condition of Using the Conditional Suspension of the Execution of the Penalty. Remarks with Reference to the Concept of “Prognosis” and Jurisdiction of the Polish Courts]. *Nowa Kodyfikacja Prawa Karnego* [online]. 2019, vol. 53, pp. 77-78 [cit. 2022-12-02]. ISSN 2084-5065. Available at: <https://doi.org/10.19195/2084-5065.53.5>.

¹⁹ See WRÓBEL, W. and A. ZOLL. *Polskie prawo karne: Część ogólna* [The Polish Criminal Law: General Part]. 1. wyd. Kraków: Znak, 2010, p. 473. ISBN 978-83-240-1351-7.

²⁰ See WRÓBEL, W. and A. ZOLL. *Polskie prawo karne: Część ogólna* [The Polish Criminal Law: General Part]. 1. wyd. Kraków: Znak, 2010, p. 473. ISBN 978-83-240-1351-7.

²¹ See *Judgement of the Supreme Court of the Republic of Poland Ref. No. V KK 377/14* [2015-01-16]. KZS 2015, no. 5, item 17, quoted from KANIA-CHRAMĘGA, A. and O. WŁODKOWSKI. *Prawo karne materialne: Część ogólna: Kazusy i zadania problemowe: Orzecznictwo*

As Rafał Kamiński rightly notices, a positive criminological forecast is the most subjective of all the above-mentioned conditions, the fulfilment of which is the basis for the application of a probation measure, which is the conditional discontinuation of the proceedings. However, when the court decides to apply it, it must have reasonable grounds to assume that the convicted person will comply with the prevailing legal order and, in particular, will not commit an offense again. Therefore, when making a decision to apply the said measure, the court pays attention to the attitude of the perpetrator indicated in the act, his/her personal characteristics and conditions and the way of life to date. In terms of attitude, the court focuses on issues such as showing remorse, communicating a desire to improve, whether the event was incidental. In terms of personal characteristics and conditions, the following are important factors: character traits, temperament and education. The current way of life is, in turn, from those components of the perpetrator's life that contributed to the commission of the crime, including environmental, family and housing conditions.²²

Krzysztof Nowicki points out that the positive prognosis for the perpetrator discussed here refers not only to the violation of the standards of criminal law, but also to all other rules outside the limits of that law. It follows from the provisions of the discussed act that the forecast is to refer to the perpetrator's compliance with the legal order and, in particular, not committing a crime. The use of the phrase "in particular", in the opinion of the same author, suggests that the content of the above-cited text (Article 66 § 1 of the Penal Code) does not only refer to crimes.²³ Moreover, the author emphasizes that it is also worth considering the content of the Article 68 of the Penal Code²⁴ regulating the issue of taking up the conditionally discontinued proceedings. In his opinion, the basis for taking up the conditionally discontinued proceedings is also a gross viola-

[Material Criminal Law: General Part: Cases and Problem Tasks: Jurisprudence]. 2. wyd. Warszawa: Difin, 2020, p. 263. ISBN 978-83-8085-591-5.

²² See KAMIŃSKI, R. Charakterystyka wybranych instytucji probacyjnych w kontekście udziału organizacji pozarządowych w ich realizacji [Characteristics of Selected Institutions of Probation in the Context of the Participation of Non-governmental Organizations in Their Implementation]. *Białostockie Studia Prawnicze* [online]. 2016, vol. 21, p. 142 [cit. 2022-12-02]. ISSN 2719-9452. Available at: <https://doi.org/10.15290/bsp.2016.21.10>.

²³ See NOWICKI, K. *Warunkowe umorzenie postępowania karnego jako alternatywny środek polityki kryminalnej w polskim procesie karnym* [Conditional Discontinuation of the Criminal Proceedings as an Alternative Measure of Criminal Policy in the Polish Criminal Trial]. 1. wyd. Wrocław: Uniwersytet Wrocławski, Wydział Prawa i Administracji, 2001, p. 62.

²⁴ See *Act of 6 June 1997 – Penal Code* [1997]. *Journal of Laws of Poland*, 2021, item 2345.

tion of the lawful order, which is not a crime. In the opinion of the Supreme Court of Poland, a gross violation of the legal order may be “a drastic or persistent violation of the norms of civil law, family law or labour law by the perpetrator.”²⁵ Considering the premise of a positive criminological forecast, the quoted author points out that when considering the issue of the perpetrator’s way of life so far, one should take into account his/her various duties, attitude to professional work, family obligations and social contacts. The whole of life should be taken into account, not the individual acts of the perpetrator. Krzysztof Nowicki emphasizes that the literature on the subject presents the view that personal qualities are the *traits of the perpetrator’s character, his/her temperament, self-criticism and sensitivity of conscience*.²⁶ On the other hand, personal conditions are nothing more than the conditions in which the perpetrator functions: environmental, family, housing and in the place of his/her work. This is also the reason why he/she committed the crime. There is a certain regularity here, i.e. the more stable this reason, the more reasons there are, the worse the criminological prognosis is. When it comes to the perpetrator’s attitude, according to the cited author, there is *striving for a specific behaviour*. In order to be able to use a positive criminological forecast as a premise for conditional discontinuation of the proceedings, the attitude must prove that it was an accidental act that will never happen again in the future. Moreover, it should be characterized by a lack of tendency to break the law and, in particular, to commit criminal acts. From the point of view of the rule of law, it should be such that it does not need to be changed. Krzysztof Nowicki is of the opinion that it is undeniable that the criminological forecast discussed in this study can only be established on the basis of a cumulative assessment of the attitude, characteristics and personal conditions of the perpetrator and his/her current lifestyle. For this, it is necessary to establish the facts on a multilateral basis on these issues.²⁷

²⁵ See Section VII point 3 of the *Resolution of the Supreme Court of the Republic of Poland Ref. No. VI KZP 26/69 [1971-01-29]*. OSNKW 1971, no. 3, item 33, concerning guidelines of the judiciary and judicial practice on the interpretation and application of criminal laws regarding conditional discontinuance of the proceedings.

²⁶ See NOWICKI, K. *Warunkowe umorzenie postępowania karnego jako alternatywny środek polityki kryminalnej w polskim procesie karnym* [Conditional Discontinuation of the Criminal Proceedings as an Alternative Measure of Criminal Policy in the Polish Criminal Trial]. 1. wyd. Wrocław: Uniwersytet Wrocławski, Wydział Prawa i Administracji, 2001, p. 63.

²⁷ See NOWICKI, K. *Warunkowe umorzenie postępowania karnego jako alternatywny środek polityki kryminalnej w polskim procesie karnym* [Conditional Discontinuation of the Criminal Proceedings as an Alternative Measure of Criminal Policy in the Polish Criminal Trial].

On the other hand, Grzegorz Goniewicz rightly points out that the conditionality of the applied probation measure, in this case the conditional discontinuation of the proceedings, is determined by the verification of a positive criminological forecast which is the basis for the decision of applying a specific measure for the probationary period, during which the perpetrators are burdened with obligations specified by the court. In the event of a positive expiry of the probationary period, the criminal proceedings will not be taken against the perpetrator when it has been conditionally discontinued. In the opinion of the above-cited author, conditional remission takes place as it were, instead of a conviction. This measure is applied by the court adjudicating on criminal liability and is followed by a judgement. In this case, the court examines the circumstances of both the perpetrator and his/her act. The study of the criminological forecast of the perpetrator of a prohibited act is based on the assumption that people's behaviour is governed by certain rules, which means that people with similar characteristics will behave in a similar way in comparable circumstances. Importantly, and what is pointed out in the jurisprudence, a positive criminological forecast, like any other forecast, includes the risk of its non-fulfilment. It is not possible to give a 100 % guarantee of its accuracy. The purpose of examining a criminological prognosis, however, is to minimize this risk to an acceptable level, so as not to deprive the social rehabilitation of sense, while reducing the risk to presumed, rational limits. Grzegorz Goniewicz reminds that on the basis of legal science, it is indicated that the *application of conditional remission does not require a probability bordering on certainty that the perpetrator will not return to the offense path (it is sufficient if the probability of not returning to the offense path is higher than the risk of recidivism)*.²⁸

The premise of a positive criminological forecast should be based not only on no criminal record for an intentional crime, but also on all other conditions specified in the Article 66 § 1 of the Penal Code. Individual of the above-mentioned premises are subject to separate assessment and

1. wyd. Wrocław: Uniwersytet Wrocławski, Wydział Prawa i Administracji, 2001, pp. 63-64.

²⁸ See GONIEWICZ, G. Pozytywna prognoza kryminologiczna jako przesłanka stosowania środków probacyjnych [Positive Criminological Forecast as a Premise for the Use of Probation Measures]. *Czasopismo Prawa Karnego i Nauk Penalnych* [online]. 2017, vol. 21, nr 4, pp. 109-113, 120 [cit. 2022-12-02]. ISSN 2719-6569. Available at: https://www.czpk.pl/dokumenty/zeszyty/2017/zeszyt4/G._Goniewicz-Pozytywna_prognoza_kryminologiczna_jako_przeslanka_stosowania_srodkow_probacyjnych.pdf.

may have a positive or a negative meaning. Only a general and final assessment of all prerequisites may justify the supposition that the perpetrator, despite the measure taken, will comply with the legal order and, in particular, will not commit a crime. To make a correct forecast, the court requires a comprehensive analysis of personal identification materials (resolution of the Supreme Court of Poland of 29 January 1971, VI KZP 26/69, OSNKW 1971, no. 3, item 33).²⁹

A positive criminological forecast consists of the attitude of the perpetrator, his/her properties, personal conditions and the way of life so far. In the opinion of Grzegorz Goniewicz, the attitude should be understood as the perpetrator's attitude towards social norms and rules, as well as the potential tendency to violate the law. Attitudes are expressed through specific behaviours. When it comes to personal conditions and properties, the quoted author emphasizes that on the basis of the legal doctrine, it is everything that defines the perpetrator in isolation from the committed prohibited act. Therefore, the properties include, for example, the level of psychophysical development, character traits, personality, sex, education, age, level of mental development, inclinations, addictions and habits, as well as health. In turn, the personal conditions include material, living, social, health and family conditions. The above-cited author also points out that all of the three components of the criminological forecast described above are sometimes referred to as the characteristics of the perpetrator.³⁰ The last component is the way of life of the perpetrator so far, and thus before the offense was committed. When adjudicating a probation measure, it may act both for the benefit and the disadvantage of the perpetrator. If there was a period in which the perpetrator lived properly, worked, enjoyed a good reputation and did not enter into conflict with the law, the incidental nature of the offense may have an advantage. However, when, on the contrary, the perpetrator has already been convicted of crimes, it may act to the disad-

²⁹ Quoted after BOJARSKI, M., J. GIEZEK and Z. SIENKIEWICZ. *Prawo karne materialne: Część ogólna i szczególna* [Material Criminal Law: General and Special Part]. 3. wyd. Warszawa: LexisNexis, 2007, p. 320. ISBN 978-83-7334-817-2.

³⁰ Quoted after GONIEWICZ, G. *Pozytywna prognoza kryminologiczna jako przesłanka stosowania środków probacyjnych* [Positive Criminological Forecast as a Premise for the Use of Probation Measures]. *Czasopismo Prawa Karnego i Nauk Penalnych* [online]. 2017, vol. 21, nr 4, p. 124 [cit. 2022-12-02]. ISSN 2719-6569. Available at: https://www.czp.k.pl/dokumenty/zeszyty/2017/zeszyt4/G._Goniewicz-Pozytywna_prognoza_kryminologiczna_jako_przeslanka_stosowania_srodkow_probacyjnych.pdf.

vantage and may result in a statement that there is no positive criminological forecast for him/her.³¹

3 Period, obligations and results of the test run

In the opinion of Andrzej Marek, the essence of the discussed institution, i.e. conditional discontinuation of the proceedings, is the abandonment of conviction and punishment for the perpetrator found guilty of a crime, for the benefit of probation measures provided for by criminal law. It is not, however, a release from criminal liability under certain conditions, nor is it a kind of conditional sentencing. It is a criminal measure related to putting the perpetrator on trial.³² The 1997 Penal Code, in line with the doctrine, deprived the prosecutor of the possibility of applying the said measure and left it to the sole discretion of the courts, which made possible to conduct a uniform penal policy. The area of its application was also expanding through a different formulation of the premises; the probation character of the institution was strengthened by introducing supervision and significantly broadening the possibilities of using a more extensive catalogue of probation duties.³³

The conditional discontinuation of the proceedings may be combined with the supervision of a probation officer or a trustworthy person, or an association, institution or appropriate social organization. When applying this measure, it is also possible to impose certain obligations on the perpetrator in the form of an obligation *to inform the court or probation officer about the course of the probation period; to apologize to the aggrieved party; to perform the maintenance obligation; to refrain from abusing alcohol or other intoxicants; to undergo addiction therapy; to undergo therapy, in particular psychotherapy or psychoeducation; to participate in corrective and educational interactions; to refrain from contacting the victim or other persons in a certain way or approaching the victim or*

³¹ See GONIEWICZ, G. Pozytywna prognoza kryminologiczna jako przesłanka stosowania środków probacyjnych [Positive Criminological Forecast as a Premise for the Use of Probation Measures]. *Czasopismo Prawa Karnego i Nauk Penalnych* [online]. 2017, vol. 21, nr 4, p. 129 [cit. 2022-12-02]. ISSN 2719-6569. Available at: https://www.czpki.pl/dokumenty/zeszyty/2017/zeszyt4/G._Goniewicz-Pozytywna_prognoza_kryminologiczna_jako_przeslanka_stosowania_srodkow_probacyjnych.pdf.

³² See MAREK, A. *Prawo karne* [Criminal Law]. 10. wyd. Warszawa: C. H. Beck, 2011, pp. 296-297. ISBN 978-83-255-2755-6.

³³ Quoted after BOJARSKI, M., J. GIEZEK and Z. SIENKIEWICZ. *Prawo karne materialne: Część ogólna i szczególna* [Material Criminal Law: General and Special Part]. 3. wyd. Warszawa: LexisNexis, 2007, p. 318. ISBN 978-83-7334-817-2.

other persons; to leave the premises shared with the aggrieved party.³⁴ By imposing on the perpetrator of an offense committed with violence or an unlawful threat against the closest person the obligation to refrain from contacting the aggrieved party or other persons in a specific way or approaching the aggrieved party or other persons, the court determines the method of contact of the perpetrator with the aggrieved party. Obligatory is the perpetrator's obligation to redress the damage in whole or in part. It is also possible to order the cash benefit provided for in the Article 39 point 7 of the Penal Code or in addition and a ban on driving vehicles for a period of up to 2 years. Importantly, the conditional remission becomes final if the perpetrator confirms with his/her behaviour the correctness of the positive forecast, which was the premise for the decision to write off, during the trial period.³⁵ The Article 68 of the Penal Code³⁶ regulates the issue of taking up the conditionally discontinued proceedings. And so, according to this provision, if the perpetrator commits an intentional crime for which he/she was convicted during the trial, the court initiates the criminal proceedings (Article 68 § 1 of the Penal Code). The court may also initiate the criminal proceedings if the perpetrator in the trial period has grossly violated the legal order and, in particular, has committed an offense other than that specified in paragraph 1 or has evaded supervision, performance of the imposed obligation or imposed penal measure, compensation measure or forfeiture, or has failed to perform the concluded with the aggrieved party (Article 68 § 2 of the Penal Code). The court takes the criminal proceedings in a situation where the circumstances referred to in the above-stated paragraph 2 arise after the perpetrator has been reminded in writing by the court or professional probation officer, unless there are special reasons against it (Article 68 § 2a of the Penal Code). Paragraph 3 of the discussed Article 68 regulates the issue of the possibility of initiating the criminal proceedings by the court in the event that the perpetrator, after issuing a decision on conditional discontinuation of the proceedings, but before it becomes final, grossly violates the legal order, in particular when he/she commits a crime at that time. In turn, in accordance with paragraph 4 of the Article 68 of the Penal Code, the conditionally discontinued proceedings cannot be resumed later than within 6 months from the end of the probation

³⁴ Quoted after GARDOCKI, L. *Prawo karne* [Criminal Law]. 21. wyd. Warszawa: C. H. Beck, 2019, p. 192. ISBN 978-83-8158-722-8.

³⁵ See GARDOCKI, L. *Prawo karne* [Criminal Law]. 21. wyd. Warszawa: C. H. Beck, 2019, p. 192. ISBN 978-83-8158-722-8.

³⁶ See *Act of 6 June 1997 – Penal Code* [1997]. *Journal of Laws of Poland*, 2021, item 2345.

period. Lech Gardocki points out that some differences in the application of the probation measure in question, i.e. conditional discontinuance of the proceedings, occur with respect to soldiers (see the Articles 333 – 334 of the Penal Code). A special regulation of this measure is also included in the Act of 29 July 2005 on Counteracting Drug Addiction (Journal of Laws of Poland, 2020, item 2050).³⁷

Final remarks

The institution of conditional discontinuance of the proceedings, as indicated by Jarosław Warylewski, is partly of a material nature and partly of a procedural nature. This measure is, as stated in the Explanatory Memorandum to the 1997 Penal Code, an alternative to absolute imprisonment, much more advantageous from the economic point of view and, on the other hand, equally effective and devoid of any negative impacts on persons deprived of their liberty.³⁸ In this context, in the justification for the introduction of the institution of conditional discontinuance of the proceedings (the justification for the draft Penal Code of year 1968), as highlighted by Andrzej Marek, we can read that the measure “implements the principle of limiting penalisation in minor cases, assuming that there are cases in which, without a conviction and punishment, educational processes can be carried out by the use of other means, thus preventing the offender from entering the path of the offense again.”³⁹

Summing up, it can be said that the essence of a probation measure in the form of conditional discontinuance of the proceedings is not to convict the perpetrator in minor cases, with the simultaneous positive characteristics of the perpetrator, but to achieve as many goals as possible for the criminal proceedings using adequate burdens. The general point is to drop the conviction and, at the same time, to punish the perpetrator of the crime.⁴⁰ The measure in question is only optional and may

³⁷ Quoted after GARDOCKI, L. *Prawo karne* [Criminal Law]. 21. wyd. Warszawa: C. H. Beck, 2019, p. 193. ISBN 978-83-8158-722-8.

³⁸ Quoted after WARYLEWSKI, J. *Prawo karne: Część ogólna* [Criminal Law: General Part]. 1. wyd. Warszawa: LexisNexis, 2004, pp. 386-387. ISBN 83-7334-375-X.

³⁹ Quoted after MAREK, A. *Prawo karne* [Criminal Law]. 10. wyd. Warszawa: C. H. Beck, 2011, p. 296. ISBN 978-83-255-2755-6.

⁴⁰ See KAMIŃSKI, R. Charakterystyka wybranych instytucji probacyjnych w kontekście udziału organizacji pozarządowych w ich realizacji [Characteristics of Selected Institutions of Probation in the Context of the Participation of Non-governmental Organizations in Their Implementation]. *Białostockie Studia Prawnicze* [online]. 2016, vol. 21, p. 138 [cit. 2022-12-02]. ISSN 2719-9452. Available at: <https://doi.org/10.15290/bsp.2016.21.10>.

only be ordered by a court judgement. The prosecutor, after finding the above-mentioned prerequisites, may, instead of the indictment, apply to the court with a request to apply the described institution to the perpetrator, specifying the probation period, obligations to be fulfilled by the accused and optionally indicating the scope of supervision. The essence of the conditional discontinuation of the proceedings is the verification of the criminological forecast and also educational influence on the perpetrator.⁴¹ This measure, referred to in the doctrine as “*controlling freedom*”, constitutes a trial waiver of conviction and punishment. Its application is based on the assumption that the guilt and act of the perpetrator are unquestionable. It is a different form of criminal liability, which consists in replacing the punishment and conviction of the perpetrator with measures of a probation nature other than punishment, which does not mean that the perpetrator is not responsible for the criminal act. It is a measure of criminal reaction related to putting the perpetrator on trial.⁴²

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⁴² Quoted after BOJARSKI, M., J. GIEZEK and Z. SIENKIEWICZ. *Prawo karne materialne: Część ogólna i szczególna* [Material Criminal Law: General and Special Part]. 3. wyd. Warszawa: LexisNexis, 2007, p. 318. ISBN 978-83-7334-817-2.

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